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No. 021635

In The

Supreme Court of the United States

RMS TECHNOLOGY, INC.,
Petitioner,

v.

TELEDYNE INDUSTRIES, INC.,
TELEDYNE TECHNOLOGIES INC.,
and
TELEDYNE BROWN ENGINEERING, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED FOR REVIEW

This appeal arises out of a subcontract whereby RMS Technology, Inc ("RMS") agreed to assemble component parts provided by Teledyne Brown Engineering, Inc. ("TBE") into three (3) First Article Armored Moving Target Carriers ("AMTC") with Bunker Electronics, and subsequently to assemble component parts provided by TBE into thirty-seven (37) AMTC and thirty-four (34) Bunker Electronics packages at RMS's facilities in Newport News, Virginia (the "Contract"). RMS submitted a claim to TBE for extra work performed under the Contract and subsequently filed suit on the claim within five years after the Contract was terminated. TBE filed a motion for summary judgment, arguing the four year statute of limitations applicable to sales of goods under the Uniform Commercial Code applied and barred the breach of contract claims. The following questions result for the Fourth Circuit's grant of summary judgment:

1. Whether the Fourth Circuit erred by concluding that there is no genuine issue of fact in dispute as to whether the Contract was for the sale of goods or for services;

2. Whether the Fourth Circuit erred by concluding that the Contract was for the sale of goods to which the Uniform Commercial Code applied.

RULE 29.6 STATEMENT

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Fourth Circuit. The corporate petitioner had no parent or publicly held company owning ten percent (10%) or more of the corporation's stock.

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RMS Technology, Inc. ("RMS") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") in this case.

OPINIONS BELOW

The February 6, 2003, Opinion of the Fourth Circuit Court of Appeals, whose judgment is herein is sought to be reviewed, is unpublished, but contains Docket No. 02-1299, and is reprinted in the separate Appendix to this Petition. The prior Memorandum Opinion and Order of the United States District Court for the Eastern District of Virginia, Newport News Division, entered October 22, 2001, and the Order of the United States District Court for the Eastern District of Virginia, Newport News Division, entered February 15, 2002, denying RMS' Motion for Reconsideration, are both unpublished, but is docketed in the United States District Court for the Eastern District of Virginia, Newport News Division, Civil Action No. 4:01CV22, and is reprinted in the separate Appendix to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on February 6, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED IN CASE

Rule 56 of the Federal Rules of Civil Procedure; Ala. Code Ann. § 7-2-105, § 7-2-106 and § 7-2-725(1).

STATEMENT OF THE CASE

On or about July 7, 1995, RMS and TME entered into a subcontract wherein RMS agreed to assemble component parts provided by TBE into three (3) First Article Armored Moving Target Carriers ("AMTC") with Bunker Electronics, and subsequently to assemble component parts provided by TBE into thirty-seven (37) AMTC and thirty-four (34) Bunker Electronics packages at RMS's facilities in Newport News, Virginia, in accordance with a production schedule of December 30, 1995, through July 30, 1996 (the "Contract"). The completed units were ultimately for use by the United States Army. The contract was terminated by TBE for alleged default by RMS on February 29, 1996. On April 26, 1996, RMS submitted a claim for $176,435.56 to Teledyne for out of scope work done in connection with the contract. RMS was never paid any amount of its claim.

On February 23, 2001, RMS filed a five (5) count Complaint in the United States District Court for the Eastern District of Virginia, Newport News Division, wherein it alleged entitlement to $282,788.78 for breach of contract, quantum meruit, impossibility and commercial impracticality of performance of the contract, unjust enrichment and constructive trust. On or about April 26, 2001, TBE, filed a Motion for Summary Judgment wherein it alleged that each Count of RMS's Complaint was filed untimely and not within the applicable statute of limitations periods. Specifically, TBE contended that the contract was for the sale of goods and was therefore governed by the Uniform Commercial Code (UCC).

REASONS FOR GRANTING THE WRIT

I.

THE FOURTH CIRCUIT ERRED BY CONCLUDING THAT THERE IS NO GENUINE ISSUE OF FACT AS TO WHETHER THE CONTRACT WAS FOR THE SALE OF GOODS OR FOR SERVICES

A Motion for Summary Judgment should be granted only when the facts and inferences to be drawn from the facts when viewed in the light most favorable to the non-moving party mandate a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986). Summary Judgment or a directed verdict is mandated only where the facts and the law will reasonably support only one conclusion. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356, 112 L.Ed.2d 866, 111 S.Ct. 807 (1991). If the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party, then there are genuine issues of material fact which preclude summary judgment. *Anderson*, 477 U.S. at 248 ("summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.."). As the Court stated in *Anderson*, "it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), the Court emphasized that the availability of summary judgment turned on whether a proper jury question was presented. There, one of the issues was whether there was a conspiracy between private persons and law enforcement officers. The District Court granted summary judgment for the defendants, stating that there was no evidence from which reasonably minded jurors might draw an inference of conspiracy. The Supreme Court reversed, pointing out that the moving parties' submissions had not foreclosed the possibility of the existence of certain facts from which "it would be open to a jury . . . to infer from the circumstances" that there had been a meeting of the minds. *Id.*, at 158-159. Any doubt as to the existence of a genuine issue of material fact must be resolved against Respondents as the moving parties. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157-159 (1970).

The Fourth Circuit has long held that the determination of whether a hybrid contract is predominately for the sale of goods and thus within the U.C.C. presents a factual question generally unsuited to resolution by summary judgment. *Coakley and Williams, Inc. v. Shatterproof Glass Corporation*, 778 F.2d 196, 197 (4th Cir. 1985); *see also Coakley and Williams, Inc. v. Shatterproof Glass Corporation*, 706 F.2d 456, 461 (4th Cir. 1983) (stating that the determination of whether a contract was predominately for goods or services "creates an uncertainty to be resolved only by a full factual presentation" and is difficult to discern "without the advantage of specificity driving from a full trial on the merits"). Notably, in its Opinion, the Fourth Circuit never addresses the Fourth Circuit's strong preference for a full factual presentation of such factually intensive determinations as to whether a contract is predominately

for goods or services or explains why this case presents the unusual exception to this strong preference. Instead, the Fourth Circuit concludes that the District Court "found" that the contract language signaled that the contract was for the sale of goods and that RMS was in the business of manufacturing goods. These conclusions failed to follow, let alone acknowledge, the Fourth Circuit's strong admonition that the determination of whether a contract was predominately for goods or services should be resolved by a full factual presentation or this Court's admonition that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial".

Furthermore, on summary judgment, all facts and inferences shall be drawn in a light most favorable to the non-moving party. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962) *(per curiam)* ("On summary judgment the inferences to be drawn from the underlying facts contained in [affidavits, attached exhibits, and depositions] must be viewed in the light most favorable to the party opposing the motion."); *see also* 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2716, pp. 274-277 (3d ed. 1998). Based on these standards, the Fourth Circuit's affirmation of the District Court's grant of Summary Judgment was erroneous.

The facts before the District Court and inferences arising from those facts when viewed in the light most favorable to RMS do not support summary judgment against RMS as a matter of law. The evidence before the Court at least casts doubt on each of the factors to which

courts look to determine whether a contract is for goods or services. A jury could reasonably determine that RMS was much like an artist completing a painting based upon the specifications provided by the buyer. *See Coakley and Williams, Inc. v. Shatterproof Glass Corporation* 706 F.2d 456, 459, Noll, *citing Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974) and quoting as follows:

> The appeal was from an adjudication on the merits, following a full trial, and reached the conclusion that a contract to supply and install bowling equipment dealt predominantly with goods, even though the amount of services involved was substantial. "The test for inclusion or exclusion [in or from the provisions of the U.C.C.] is not whether they are mixed, but, granting that they are mixed, whether their predominate factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) N15 or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).

The Contract at issue is a form contract suited for use in both goods and services contracts. The District Court and the Fourth Circuit noted several indicia that the contract is for the sale of goods, including Contract is titled a "Purchase Order" and incorporates General Terms and Conditions, which refer to "buyer" and "seller". The District Court's and the Fourth Circuit's reliance upon

these "indicia" was misguided and failed to take into account relevant undisputed facts that demonstrate the Contract was predominately for services.

The General Terms and Conditions of the Contract consistently use the phrase "goods *or* services", an indication that the document contemplates either type of contract. Furthermore, RMS's duties pursuant to the Contract are defined in a "Statement of *Work*", certainly a word that commonly denotes services. In the "Statement of Work", Section 1.3, entitled "Strategy", RMS and TBE set forth the agreed division of work as follows: "...Teledyne will provide necessary raw materials and R.M.S. shall *fabricate* the long lead time items defined in this S.O.W....". Based on this language of the Contract, the only work to be provided by RMS was the service of fabricating raw materials provided by TBE. Finally, while the General Terms and conditions did refer to "buyer and seller", RMS wishes to draw the Court's attention to Section 14B.2, which provides that "...the word 'contractor' shall mean 'Seller'" in connection with the forty-six (46) Federal Acquisition Regulation provisions and clauses incorporated into the TBE/RMS Contract that utilize the term "Contractor" instead of "Seller". The term "Contractor" is usually used in services transactions. *See BMC Industries, Inc. v. Barth Industries, Inc.*, 160 F.3d 1322, 1332 (11th Cir. 1998).

The District Court found it important, as did the Fourth Circuit, that the Contract in the present case is referred to as a "Purchase Order." The title "Purchase Order" is not dispositive. The contract at issue in the *Princess* case was also a "Purchase Order." *Princess Cruises, Inc. v. Gen. Elec. Co.*, 143 F.3d 828, 830, 833-35 (4th Cir. 1998). In *Princess*, GE contracted to repair some of

Princess's cruise ship turbines. GE agreed to supply all services, labor, and materials. *Id.* at 830. In examining the contract, the Court noted, "[i]t is plain that the GE-Princess transaction principally concerned the rendering of services . . . with incidental—albeit expensive—parts supplied by GE." (*Id.* at 833). The Court reasoned further:

> Although GE's materials list shows that GE planned to manufacture a small number of parts for Princess, Princess appeared to have most of the needed materials on board . . . Thus, the language of both the Purchase Order and the Final Price Quotation indicates that although GE planned to supply certain parts, the parts were incidental to the contract's predominant purpose . . .

The facts of *Princess* are analogous to the present case where although Appellant provided some incidental parts, Appellee provided nearly all of the needed materials for completion of the AMTC's.

In order for the UCC to apply there must be a "passing of title from the seller to the buyer for a price." ALA Code Section 7-2-106 (1). Here, the District Court determined that "the Contract provides that title and risk of loss to goods shall pass to TBE upon receipt at TBE's designated destination." The Fourth Circuit also relied upon this "finding". However, the Contract contains contradictory language as to the passing of title. While TBE's General Terms and Conditions contained Section 12 which provided that title and risk of loss would pass to TBE upon receipt of TBE's designated destination, it

also contained Section 12 requiring RMS to insure all materials, tools and equipment of TBE in RMS's possession, indicating the parties intent that TBE retained title to the raw materials it provided to RMS to fabricate. RMS, on the other hand, produced admissible evidence proving that RMS did not pass title to any goods to TBE, because RMS never had title it could pass. All of the component parts needed to assemble the target mechanisms were procured by TME and delivered to RMS to put them together. (See, e.g., Hill aff. at ¶ 7)

The following facts demonstrate that the parties did not intend for title to transfer to TBE upon receipt at TBE's designated destination.

(1) TBE supplied all of the materials to be used to assemble the AMTC's and retained title during the assembly process. (Hill aff. at ¶ 7; Heyman aff. at ¶ 5; RMS ex. A-1.)

(2) RMS was required to insure TBE's materials that were in RMS's possession. (TBE ex. G at § 9.)

(3) TBE transferred title to the materials to the U.S. Government while the materials were in RMS's possession. (TBE ex. J.)

(4) When a dispute arose as to the Contract, TBE insisted upon "a detailed audit for materials supplied by TBE." (Memo from TBE to RMS dated January 23, 1996, TBE exhibit H.)

(5) The January 23, 1996 memo also requested reassurance that RMS could fulfill its "commitment to provide the necessary resources (manpower) to complete the 40 AMTC units in a timely manner."

(6) Upon terminating the Contract, TBE notified RMS that "TBE representatives will remove all such Government property, including but not limited to AMTC's, carriers, complete and partial assemblies, materials and documentation from RMS' facility beginning March 1, 1996." (TBE ex J.)

The inference from these facts when viewed in the light most favorable to RMS is that RMS never acquired title to the product and that RMS was only providing a service by assembling those products. In this case, because RMS never held title to the materials, RMS *could not* pass title as required by the UCC.

The Fourth Circuit's reliance upon a warranty of merchantability and fitness for a particular purpose is misplaced. It is apparent from a reading of the Contract, that it was a form contract to be used for both goods and services. Thus such warranties, which are usually indicia of a contract for goods, would not be dispositive. The District Court and the Fourth Circuit both seemed to latch on to certain "indicia, but in the process ignore the principal test for whether the contract was for goods or services, namely whether their predominate factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved...or is a transaction of sale with labor incidentally involved...".

The Fourth Circuit relied heavily upon and agreed with the District Court's finding that RMS was in the business of manufacturing and selling AMTC systems using its own materials. In assessing the second factor in determining whether the Contract was predominately for goods or services, the District Court stated: "With respect to the second factor, RMS does not dispute that it is engaged in the business of manufacturing and selling AMTC's using its own materials, a factor that favors a finding that the contract is for the sale of goods." RMS did dispute that it was engaged in the business of manufacturing and selling AMTC's. Furthermore, there was no admissible evidence before the District Court or available to the Fourth Circuit to allow a determination as to the nature of RMS' business. TBE, as the party asserting the bar of statute of limitations, has the burden to prove that the UCC applies. *Clifton D. Mayhew v. Blake Construction*, 482 F.2d 1260 (4th Cir. 1973); *Insul-Mark Midwest, Inc. v. Kor-It Sales, Inc.*, 612 N.E.2d 550, 555 (Ind. 1993). Before the District Court could consider whether RMS was engaged in the business of manufacturing and selling AMTC's using its own materials, TBE must bring forward admissible evidence as to the nature of RMS' business.

TBE failed to produce any such evidence. TBE merely argued in its Reply Memorandum that RMS participated in other government contracts calling for the assembly of AMTC's. TBE did not produce any contracts, or other admissible evidence, to demonstrate that those contracts were, in fact, contracts for the sale of goods. Nor would this factor be dispositive. In *Princess Cruises* this Court noted that General Electric, the supplier in that case, was known as a manufacturer of goods. *Princess Cruises*, 143 F.3d at 833. Nonetheless, the Fourth Circuit

held that the contract at issue in *Princess Cruises* was a contract for services. *Id.* In this case, TBE first raised the supposed nature of RMS' business in its reply brief, and therefore, RMS had no opportunity to deny the unsupported allegation at the District Court level. This disputed fact must be the subject of a trial on the merits. As such, the District Court's reliance on this disputed fact in rendering Summary Judgment and the Fourth Circuit's reliance in affirming Summary Judgment is inappropriate.

The Fourth Circuit concluded that "the intrinsic worth factor also weighs in favor of a contract for goods rather than services." However, any materials provided by RMS were purely incidental to the predominant purpose of the Contract to provide services to assemble the AMTCs. The District Court determined that "RMS was to supply primer/paint/cleaning chemicals, consumables and hydraulic fluid, which is more than essentially the manpower and machine capability that was required in *Wells*." This determination seems to stem from footnote 2 in TBE's Reply Brief, which refers to an alleged Contract provision for a **not-to-exceed amount** of $33,020 for RMS-furnished materials contained in Change Order 8 to the Contract. The extent to which Change Order 8 was ever agreed upon by the parties and to which RMS actually provided materials is, however, a subject of genuine dispute. RMS is entitled to have the competing facts and inferences considered in its favor on summary judgment.

Hill's sworn Affidavit asserts that the operative purchase order is attached to his affidavit as Exhibit A-1, which incorporates the Scope of Work dated July 6, 1995. The Statement of Work specifies that TBE "will provide

necessary raw materials and R.M.S. will fabricate" the items. The original Purchase Order contains no reference to RMS provided materials.

The District Court cannot, on a motion for summary judgment, adopt conclusory allegations made in a reply brief by a moving party. Particularly where, as here, the moving party has the burden of proof on the particular issue affected. Even assuming that RMS agreed to the Purchase Order Change Order No. 8, the amount of materials is insignificant when viewed in light of a contract worth nearly three quarters of a million dollars. The facts demonstrate that any incidental consumables provided by RMS were no different than the materials provided by the manufacturers in *Wells*.

Even if provided materials with an aggregate value not exceed $33,020.00, compared to the $705,000 worth of labor provided by RMS pursuant to the Contract, it is apparent that the intrinsic worth of the materials supplied by RMS constituted an insignificant five percent (5%) of the total Contract. This proportion is simply insufficient to prove that goods predominated the transaction. The $33,000.00 worth of consumables allegedly supplied by RMS made up less than half of one percent (0.5%) of the more than $6,000,000.00 total value of the contract between TBE and Lockheed Martin. TBE ex. A. Viewed in this light, there is an undeniable inference that the materials supplied by RMS, if in fact they were, were merely incidental to the provision of services.

In contrast to the paltry five percent (5%) at issue in this case, the court in *Curtis Publishing Co. v. Sheridan*, 53 F.R.D. 642 (S.D.N.Y. 1961), found that a book publisher

was performing a contract for services despite providing paper constituting approximately thirty percent (30%) of the total value of the contract. More significant, however, is the proportion of RMS supplied materials in relation to the value of the finished AMTC's. In conclusion, the intrinsic worth of the materials supplied by RMS was insignificant and this third factor in determining the nature of the Contract weighs heavily in favor of a services contract.

In short, at best, the facts bearing upon the question whether the Contract was predominately for goods or services are conflicting, genuinely in dispute and a proper jury question. The District Court Judge weighed the evidence and determined that the Contract was principally for goods, rather than determining that there were genuine issues for trial. As such, the District Court's grant and the Fourth Circuit's affirmation of Summary Judgment are contrary to Rule 56 of the Federal Rules of Civil Procedure and are reversible.

II.

THE DISTRICT COURT ERRED BY CONCLUDING THAT THE CONTRACT AS FOR THE SALE OF GOODS TO WHICH THE UNIFORM COMMERCIAL CODE APPLIED

The UCC is inapplicable because RMS sold services and not goods to TBE. *See Omac, Inc. v. Southwestern Machine & Tool Works, Inc.*, 189 Ga. App. 42, 374 S.E.2d 829 (1988). RMS performed work on materials supplied by TBE, according to plans and specifications supplied by TBE, and then returned the finished product to TBE. See Heyman Affidavit at ¶¶ 5-13; Hill Affidavit

at ¶¶ 5-16. "A contract which calls merely for the rendition of services is not subject to the sales provisions of the Code." *Wells v. 10-X Manufacturing Company,* 609 F.2d 248, 254 (6th Cir. 1979). The UCC only applies to "transactions in goods." Code of Ala. § 7-2-102 (2000).[1]

"The fact that the party supplying a service does so in conjunction with the delivery of goods does not necessarily mean that the transaction comes within the Code." *Wells,* 609 F.2d at 254. In *Wells,* a manufacturer agreed to take material, provided by Wells, and "'cut, make and finish' for Wells 550 dozen hunting shirts." *Id.* at 255. The court held that the manufacturer was providing a service by adding value to Wells' materials. *Id.* In the present case, the original scope of work stated that RMS would 'fabricate' parts for TBE using materials supplied by TBE. Hill Affidavit at ¶¶ 4 and 5; Heyman Affidavit at ¶¶ 4 and 5. RMS was providing a service to add value to the materials supplied by TBE. Therefore, the UCC does not apply. *Id.; see also Curtis Publishing Company v. Sheridan,* 53 F.R.D. 642, 1971 U.S. Dist. Lexis 10572 (S.D.N.Y 1971) (contract to print and bind book was a contract for services, even if printer supplied paper.); *Insul-Mark Midwest, Inc. v. Kor-It Sales, Inc.,*612 N.E. 2d 550; 1993 Ind. Lexis 51 (In. 1993) (applying coating to screws supplied by purchaser was contract for

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[1]The applicable portions of the Virginia and Alabama UCC are substantially similar. The Alabama code will be cited herein because the parties agreed that Alabama law would govern the rights of the parties to the contract.

services); *American Warehouse & Moving Service of Atlanta, Inc. v. Floyd's Diesel Service*, 164 Ga. App. 106; 296 S.E.2d 64 (Ct. App. Ga. 1982) (contract to rebuild customer supplied engine, although adding replacement parts, was contract for services.)

The Richmond division of the District Court for the Eastern District of Virginia, when faced with a similar 'value added to materials' contract, held that the UCC did not apply. *See Moore v. Allied Chemical Corp.*, 480 F. Supp. 364 (E.D. Va. 1979). In *Moore*, Allied Chemical supplied Life Science Products Corp. (LSP) the raw materials necessary to manufacture Kepone. *Id.* "LSP processed the raw materials into Kepone and returned the finished product to Allied, which paid LSP for its services." *Id.* at 375. "Allied retained title to the raw materials and to the finished product at all times." *Id.* The court held that the "compensation paid to LSP was for services rendered, not for goods conveyed." *Id.* The circumstances in *Moore* are very similar to the present case in that RMS rendered services to enhance the value of the materials TBE supplied.

The UCC does not apply to the Contract even if RMS supplied some incidental materials. *See Cary Oil Co., Inc. v. MG Refining and Marketing, Inc.*, 90 F. Supp. 2d 401 (S.D.N.Y. 2000). When confronted with a mixed goods and services contract, courts use the 'primary purpose' test to determine whether the UCC statute of limitations applies to a contract. *Id.* If the contract is primarily for services the UCC does not apply. *Id.* "This analysis is made in light of the parties' intent as indicated by the circumstances rather than the content of the four corners of the contract alone." *Id.* at 407. A motion for summary judgment is not designed to address such a

factual inquiry. *Coakley and Williams, Inc. v. Shatterproof Glass Corporation*, 778 F.2d 196, 197 (4th Cir. (1985). *See also Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950) (Summary judgment "should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law.") RMS has produced sufficient evidence to demonstrate that, at the very least, there is a dispute of fact concerning the primary purpose of the Contract.

The correspondence between the parties makes it clear that RMS negotiated a price for forty units based on services performed on materials supplied by TBE. Hill Affidavit at ¶¶ 11-16; Heyman Affidavit at ¶¶ 9-13. To determine the bid price, RMS calculated the man-hours necessary to provide the services necessary. Hill Affidavit at ¶ 12.

Both the May 26, 1995, and the June 3, 1995, letters from Martin Hill of RMS to TBE provide that, "TBE shall provide all material to complete 37 AMTC Systems (29 basic contract and 8 option) and all material to complete three Carrier Assemblies (2 basic contract and 1 option)." and that: "TBE furnished material shall be available and consumed during the first two program years. RMS shall procure material for the remaining AMTC Systems during program years 3, 4, and 5." See Hill Affidavit ¶¶ 9, 10, 13 and 14, and Exhibits A-2 and A-3 thereto. RMS' May 26, 1995, price quotation letter contained a spreadsheet designated as "sumnomat.xls", which was short for "summary no material", depicting the detail of RMS's cost estimate to TBE for the 40 units for which TBE eventually issued the Contract. Only minor "Engineering/Fixturing" and "Packaging" material costs

were included. Hill Affidavit ¶ 11. RMS' June 6, 1995, price quotation letter from Charles Heyman contained a revised spreadsheet designated as "sumnomat.xls", which was short for "summary no material", depicting the detail of RMS's cost estimate to TBE for the 40 units for which TBE eventually issued the Contract. Only minor "Engineering/Fixturing" material costs were included. Heyman Affidavit ¶ 10, and Exhibit B-1 thereto. The pricing summaries contained on the "sumnomat.xls" spreadsheets attached to the foregoing RMS price quotations to TBE were the basis, with minor price reduction adjustments, of the Contract issued to RMS. Hill Affidavit at ¶¶ 11 and 12; Heyman Affidavit at ¶ 10.

TBE's June 12, 1995, letter addressed to and received by Charles Heyman of RMS includes as an attachment labeled "RMS Estimated Costs (Including TBE Burdens)" RMS's price proposal breakdown annotated by TBE. Such attachment demonstrates that TBE was to provide RMS, at TBE's cost, all material necessary to fabricate the 40 units which became the subject of the Contract with RMS. Heyman Affidavit at ¶ 11, and Exhibit B-2 thereto.

The Contract and all subsequent change orders thereto only covered program years 1 and 2, for which TBE was to supply all material. The Contract never tasked RMS to perform work for program years 3, 4 or 5 and never required RMS to supply the materials for fabrication, assembly or testing of any equipment to be delivered thereunder. Hill Affidavit at ¶ 16; Heyman Affidavit at ¶ 13.

The Contract itself reflects this intention. Initially, RMS agreed to fabricate component parts of the AMTC systems out of materials provided by TBE. *See* Statement of Facts hereinabove. Hill Affidavit at ¶¶ 4 and 5; Heyman Affidavit at ¶¶ 4 and 5. Later, the scope of work expanded to include assembly of the component parts, which were still made from materials supplied by TBE. Hill Affidavit at ¶¶ 6-8; Heyman Affidavit at ¶¶ 6-7. At all times TBE supplied the materials used by RMS to produce the components. *Id.* TBE never transferred title of the materials to RMS. Hill Affidavit at ¶ 7.

The parties did contemplate that in years three, four, and five of the project, TBE and RMS could enter into a contract wherein RMS would purchase its own materials and produce the complete product. Hill Affidavit at ¶ 16; Heyman Affidavit at ¶ 13. However, no such contract was ever executed. Hill Affidavit at ¶ 16; Heyman Affidavit at ¶ 13.

In conclusion, RMS agreed to perform services for TBE. RMS agreed to take the raw materials TBE supplied; fabricate and assemble the components as directed; and then return the finished product to TBE; in exchange for payment. Thus, the Contract did not involve a transaction in goods to which the UCC four year statute of limitations would apply. The District Court's and the Fourth Circuit's conclusion that the Contract was predominately for services is clearly erroneous based upon the undisputed facts and, therefore, the grant of Summary Judgment in favor of TBE should be reversed.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RMS TECHNOLOGY, INCORPORATED,
Plaintiff-Appellant,

v. No. 02-1299

TDY INDUSTRIES, INCORPORATED, t/a
Teledyne Industries, Incorporated;
TELEDYNE TECHNOLOGIES, INCORPORATED;
TELEDYNE BROWN ENGINEERING, INCORPORATED,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia, at Newport News.
Raymond A. Jackson, District Judge.
(CA-01-22-4)

Argued: December 5, 2002
Decided: February 6, 2003
[Entered: February 6, 2003]

Before WILKINSON, Chief Judge, and LUTTIG
and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: William Anthony Lascara, PENDER & COWARD, P.C., Virginia Beach, Virginia, for Appellant. Michael Alexander Hopkins, MCKENNA, LONG & ALDRIDGE, L.L.P., Washington, D.C., for Appellees. ON BRIEF: Raymond B. Biagini, MCKENNA, LONG & ALDRIDGE, L.L.P., Washington, D.C., for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Plaintiff RMS Technology brings this appeal alleging that the district court improperly dismissed its complaint against defendants Teledyne Industries, Inc., Teledyne Technologies Inc., and Teledyne Brown Engineering, Inc. (collectively "Teledyne") on summary judgment. The district court properly applied both the Uniform Commercial Code and Virginia procedural law to these claims to find that the suit was filed outside of the applicable limitations period. We thus affirm the dismissal of RMS's case.

I.

Lockheed Martin, which is not a party to this suit, contracted with Teledyne on May 2, 1995, to fabricate, test, and deliver armor moving target carrier ("AMTC") systems. The AMTC systems were part of a Remote Target System ("RETS") requested by the U.S. government to provide realistic combat training for the

armed services. On July 7, 1995, Teledyne executed a contract ("Purchase Order 456258") with RMS Technology under which RMS agreed to manufacture three first article and thirty-seven subsequent AMTC systems in its facilities in Newport News, Virginia. This assembly was to be completed between December 30, 1995, and July 30, 1996.

Contract negotiations between Teledyne and RMS consisted of an exchange of letters regarding price estimates and each company's responsibility under the purchase order. In its initial response to Tele-dyne's request for quotes, RMS advised Teledyne that the price would vary based on what portion of the materials Teledyne supplied for the project. RMS also informed Teledyne that RMS was currently producing AMTC systems for the U.S. military, that RMS would continue production until December 1995, and that RMS thought any remaining first article tests on the AMTC systems might be waived because of its experience manufacturing such systems. Ultimately, the parties agreed that Teledyne would supply most of the raw materials for the first two years of production and that RMS would supply primer, paint, cleaning chemicals, consumables and hydraulic fluid.

The contract provided that all work was to be completed in "accordance with the total technical and delivery requirements and terms and conditions as specified in the reference purchase order." It also required RMS to represent and warrant "that the goods and services furnished" under the contract "be merchantable and fit for the particular purpose intended [and] free of defects in design workmanship

and materials." The contract further provided that "[t]itle and risk of loss to goods shall pass to Buyer upon receipt at Buyer's designated destination." Lastly, the contract contained a choice of law provision, stating that "[t]he rights and obligations of the parties hereto shall be governed by the law of the State of Alabama." On February 22, 1996, RMS advised Teledyne that it was "compelled to stop work on contract number 456258 due to a lack of funds," RMS also informed Teledyne that it had laid off all of its employees. Following receipt of RMS's correspondence, Teledyne sent a letter to RMS on February 29, 1996, alleging default by RMS and terminating the contract.

On April 26, 1996, RMS submitted a claim for $176,435.56 to Teledyne for out of scope work done in connection with the contract. Teledyne responded by letter, informing RMS that it would submit all valid and substantiated claims to Lockheed Martin as part of its settlement proposal. In November, 1996, Teledyne sent this proposal to Lockheed Martin, including only the amounts that Teledyne had actually paid to RMS. Teledyne also informed Lockheed that RMS had claimed additional costs, but that such costs were not included in the proposal because they were not yet substantiated. On December 20, 1996, Teledyne entered into a settlement agreement with Lockheed Martin which did not include any sums for the allegedly out of scope work.

On February 23, 2001, RMS filed a five count complaint against Teledyne in the United States District Court for the Eastern District of Virginia for $282,788.78, plus pre-judgment interest and costs. RMS

alleged breach of contract (Count I), quantum meruit (Count II), impossibility and commercial impracticality of performance of the contract (Count El), unjust enrichment (Count IV), and constructive trust (Count V). Teledyne filed a motion for summary judgment on April 26, 2001, arguing that each count of RMS's complaint had been filed outside the applicable statute of limitations period.

Specifically, Teledyne contended that the contract was for the sale of goods and was therefore governed by the Uniform Commercial Code (UCC). Teledyne also argued that the equitable counts of the complaint were barred by Virginia's three year statute of limitations for unwritten contracts. The district court agreed and granted Tele-dyne's motion for summary judgment on October 22, 2001. RMS appeals this ruling.

II.

Summary judgment is appropriate when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The district court found that there was no genuine issue of fact in this case as to which statutes of limitations applied. We agree.

A.

RMS first contends that the district court erred by applying the UCC's four year statute of limitations to Counts I and HI of its complaint. Whether a particular transaction is governed by the UCC depends

on the predominant purpose of the transaction, however. *Princess Cruises, Inc. v. Gen. Elec. Co.*, 143 F.3d 828, 832-33 (4th Cir. 1998). Where, as here, a transaction is primarily for the sale of goods, the terms of the UCC govern claims arising from that transaction. *Id.* RMS argues that its duty under the contract was only to provide the necessary labor, processes and facilities to fabricate the AMTC systems with materials provided by Teledyne. The contract price, then, was based solely on the cost of the man-hours needed to complete the contract and not on the cost of the AMTC systems themselves. Therefore, RMS contends that the district court erred in finding that RMS did not create a genuine issue of fact as to whether the contract was for the rendering of services or for the sale of goods.

Three factors are helpful in determining the primary purpose of a contract: (1) the language of the contract; (2) the nature of the business of the supplier; and (3) the intrinsic worth of the materials involved. *Coakley and Williams, Inc. v. Shatterproof Glass Corp.*, 778 F.2d 196, 197 (4th Cir. 1985). Each of these factors weighs in favor of a finding that this contract was for the sale of goods.

Under the first factor, the district court correctly found that a number of indicia in the contract language signal that the contract was for the sale of goods. The UCC defines goods as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale." Ala. Code Ann. § 7-2-105(1). It defines the sale of goods as "the passing of title from the seller to the "buyer for a price." Ala. Code Ann. §7-2-106(1). The contract between Teledyne and

RMS was rife with language peculiar to a transaction for the sale of goods. The contract was titled "purchase order" and consistently referred to the parties as "buyer" and "seller." The contract also specifically provided that "title and risk of loss to goods shall pass to Buyer upon receipt at Buyer's designated destination." This language indicates both that the items in question were moveables and that title to these items would pass from RMS to Tele-dyne upon completion of the transaction.

Further, the contract required RMS to provide a warranty of merchantability and fitness for a particular purpose. Such warranties are seldom, if ever, found in a contract for services. The contract additionally directed RMS to provide first article units for testing, a frequent requirement under government contracts for the sale of goods. These clauses are generally used to ensure "that the contractor can furnish a product that conforms to all contract requirements for acceptance." 48 C.F.R. § 9.302 (1995). This language makes clear that the purpose of the contract was to facilitate RMS's sale of the AMTC systems to Teledyne.

The second factor also weighs in favor of a finding that the contract was for goods and not services. The district court found that RMS was in the business of manufacturing and selling AMTC systems using its own materials. This determination was correct. RMS initially offered to manufacture the AMTC systems for Teledyne without Teledyne supplying any of the materials. Such an offer demonstrates that RMS was capable of producing the product for sale using its own materials. Additionally,

RMS was in the process of manufacturing AMTC systems for the U.S. military when it entered into this contract with Teledyne. In fact, RMS had already completed first article testing on the AMTC system for the government. The record clearly supports a finding that RMS was in the business of manufacturing and selling AMTC systems and not merely providing the services necessary to assemble such systems.

Although the district court did not explicitly address the third prong of the *Coakley* test, the intrinsic worth factor also weighs in favor of a contract for goods rather than services. While a service provider may supply some incidental materials for a project, a party that provides more than that is offering a unique finished good, not a service. As the district court noted, RMS supplied more than an incidental amount of material for the project. RMS was obligated under the contract to supply primer, paint, cleaning chemicals, consumables and hydraulic fluid. RMS did more than merely add value to the materials supplied by Teledyne; it provided both materials and labor to manufacture a highly specialized product that it sold to Teledyne.

The fact that Teledyne supplied the majority of the raw materials for the project does not change the underlying nature of the contract. RMS agreed to manufacture specialized military equipment and then pass title for that equipment to Teledyne for a price. This sort of contract is necessarily one for the sale of goods and is properly governed by the UCC.

RMS next argues that the court incorrectly applied the Virginia, rather than the Alabama, statutes of limitations to all counts of the complaint. The contract between RMS and Teledyne contained a choice of law clause stating that "[t]he rights and obligations of the parties hereto shall be governed by the law of the State of Alabama." RMS argues that this clause encompasses all claims arising out of the contract between these parties and therefore the complaint should be governed by Alabama contract law.*

When sitting in diversity, a federal court must apply the choice of law rules of the forum state, in this case Virginia. *Klaxon Co. v. Sten-tor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Under Virginia law, the parties' choice of law will be enforced if it is "reasonably related to the purpose of the agreement." *Hooper v. Musolino*, 364 S.E.2d 207, 211 (Va. 1988). However, such clauses are only applied so far as the question before the court is one of substantive law. Virginia courts apply their own law "in matters that relate to procedure." *Id.* Therefore, even though the contract contains a provision generally choosing Alabama law to govern contract disputes, this choice of law provision does not extend to procedural questions.

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* RMS argues that Ala. Code § 6-2-34, which provides a six year statute of limitations for any action arising out of a simple contract, applies to Counts I and III. We have already determined that the UCC applies to these counts of the complaint. Both the Virginia UCC and the Alabama UCC have a four year limitations period for breach of contract claims. Va. Code Ann. § 8.2-725(1); Ala. Code § 7-2-725(1)

Statutes of limitations are considered matters of procedure in Virginia courts, unless they are so bound up with the substantive law of a claim that the limitations period is itself considered substantive. *Jones v. R.S. Jones and Assoc., Inc.*, 431 S.E.2d 33, 35 (Va. 1993). There is no reason to depart from the general rule in this case. Statutes of limitation that apply to traditional rights of action in contract and tort are almost always procedural. *Id.* And courts that have specifically examined statutes of limitations in the context of the UCC have consistently found them to be procedural. *See, e.g., Johansen v. E.I. Du Pont De Nemours & Co.*, 810 F.2d 1377, 1381 (5th Cir. 1987); *Natale v. Upjohn Co.*, 236 F.Supp. 37, 41 (D. Del. 1964); *Tammac Corp. v. Williams*, 1993 WL 330639 at 17 (W.D.N.Y. 1993). Therefore, under Virginia's choice of law principles, Virginia law must govern the statutes of limitations in this case.

C.

Lastly, RMS contends that even if this court applies Virginia law, Counts n, IV, and V of the complaint, which are matters in equity, were timely filed and should not be dismissed. RMS argues that in Virginia "equity follows the law" and therefore an equitable claim arising from a written contract should be governed by Virginia's five year statute of limitations for written contracts. However, these claims are based on contracts implied in law and are therefore subject to a three year statute of limitations.

Virginia Code § 8.01-246(4) provides that actions based on unwritten contracts must be brought within three years of the cause of action accruing. This

provision applies to both express unwritten contracts and contracts implied in law. *See Harbour Gate Owners' Ass'n v. Berg,* 348 S.E.2d 252, 257 (Va. 1986). All three of the claims in question are based on contracts implied in law. Count n of the complaint alleges that Teledyne promised to pay for the labor, equipment and materials supplied by RMS in performing under the contract. RMS asks the court to imply a contract for reasonable compensation for these items. In Count IV, RMS alleges that Teledyne was unjustly enriched by its settlement with Lockheed Martin and asks the court to imply an obligation to repay RMS the amount Teledyne benefitted in the settlement agreement for work done by RMS. Lastly, Count V alleges constructive trust. Again, RMS asks the court to imply a contract in law and find that RMS is the rightful owner of the settlement funds. Where, as here, the plaintiff seeks to have the court imply a contract in law, that contract is necessarily unwritten. Indeed, one Virginia court has specifically found both unjust enrichment and constructive trust claims subject to the three year statute of limitations. *Tsui v. Sobral,* 39 Va. Cir. 486, 488 (1996). Thus the district court correctly held that these claims were subject to the three year statute of limitations.

For the foregoing reasons, the claims of RMS were properly dismissed as untimely and the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

RMS TECHNOLOGY, INC.,
Plaintiff,

v. Civil Action No. 4:01cv22

TDY INDUSTRIES, INC., t/a
TELEDYNE INDUSTRIES INCORPORATED
TELEDYNE TECHNOLOGIES INCORPORATED
TELEDYNE BROWN ENGINEERING, INC.,
Defendants.

[Entered: October 22, 2001]

MEMORANDUM OPINION AND ORDER

This diversity matter comes before the Court on defendants TDY Industries, Inc., Teledyne Technologies Inc., and Teledyne Brown Engineering, Inc.'s (collectively, "TBE") Motion for Summary Judgment. The Court has considered the memoranda of the parties and the matter is now ripe for decision. A hearing is not necessary as it will not aid the decisional process of the Court. For the foregoing reasons, TBE's Motion for Summary Judgment is **GRANTED.**

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 7, 1995, TBE awarded Purchase Order 456258 ("Contract") to RMS Technology, Inc. ("RMS"), which required RMS to manufacture and deliver armor

moving target carrier ("AMTC") systems.[1] TBE supplied the raw materials and the specifications to be used by RMS in manufacturing the AMTC systems. On February 22, 1996, RMS stopped work on the contract and laid off its employees. On February 29, 1996, TBE terminated the contract, alleging default by RMS. RMS submitted a claim to TBE on April 26, 1996, for alleged out of scope work. On December 20, 1996, TBE entered into a settlement agreement with Lockheed Martin in connection with their subcontract. RMS filed a five-count complaint on February 28, 2001, alleging breach of contract, quantum meruit, impossibility and commercial impracticability of performance, unjust enrichment and constructive trust, all based primarily on TBE's failure to pay RMS any funds for work performed on the contract. On April 26, 2001, TBE moved for summary judgment on all counts, and RMS filed its opposition to summary judgment on May 8, 2001.

II. LEGAL STANDARD

Rule 56(c) provides for summary judgment if the Court, viewing the record as a whole, determines "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). However, the Court may grant summary judgment on "the issue of liability alone although there is a genuine issue as to the amount of damages." Fed. R. Civ. P. 56(c). In

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[1] The ATMC systems were ultimately to be used in larger systems by the U.S. Army, which contracted with Lockheed Martin. Lockheed Martin in turn subcontracted with TBE, and TBE then subcontracted with RMS. Lockheed Martin is not a party to this suit.

deciding a motion for summary judgment, the Court must view the facts and inferences to be drawn from the facts in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). To defeat summary judgment, the nonmoving party, in this case, RMS, must go beyond the pleadings with affidavits, depositions, interrogatories, or other evidence to show that there is in fact a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If the nonmovant cannot, for reasons stated, "present by affidavit facts *essential* to justify the party's opposition," then the Court may, in its discretion, refuse a motion for summary judgment. Fed. R. Civ. P. 56(f) (emphasis added).

III. DISCUSSION

This Court has subject matter jurisdiction over this matter by virtue of the diversity statute. 28 U.S.C. § 1332(a)(l) (1994 & Supp. IV 1998). RMS pleaded damages exceeding $75,000 -$282,788.78 plus costs, expenses and interest. Compl. ¶¶ 6, 8, 9-10; *see also St. Paul Mercury Indent. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938) (stating the amount in controversy is based on the amount pleaded in the complaint unless it appears to a legal certainty that the claim is really for less than the jurisdictional amount). In addition, TDY Industries is a California corporation, Teledyne Technologies is a Delaware corporation, Teledyne Brown Engineering is a Delaware corporation, and RMS is a Virginia corporation. The corporate parties have diverse citizenship because each corporation is a citizen of its respective place of incorporation. 28 U.S.C. § 1332(c) (1994).

A. There is no genuine issue of fact as to whether the contract was for the sale of goods or services.

TBE moves for summary judgment as to Counts I and III of the Complaint on the grounds that those claims are time-barred by the applicable Uniform Commercial Code (UCC) statute of limitations. TBE claims that the essence of the contract was for the sale of goods because the ATMC systems were to be specially manufactured by RMS. RMS, however, claims that the UCC is inapplicable because the contract was for the sale of services.

Article 2 of the UCC "applies to transactions in goods." ALA CODE § 7-2-102.[2] "Goods" are defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . . ." ALA CODE § 7-2-105(1). The UCC further provides that the sale of goods "consists in the passing of title from the seller to the buyer for a price," and "title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties." ALA CODE § 7-2-106(1), -401(1). The UCC does not apply to a contract for the rendering of services.

In determining whether the UCC applies to the contract in this case, the Court must determine whether the contract primarily concerns the furnishing of goods or the rendering of services. *Princess Cruises, Inc. v. Gen.*

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[2] The Court is relying upon the Alabama version of the UCC because the choice of law provision in the contract at issue provides that Alabama law will govern any contractual dispute.

Elec. Co., 143 F.3d 828, 833 (4th Cir. 1998). To make this determination, the Court must consider the following factors: (1) the language of the contract, (2) the nature of the business of the supplier, and (3) the intrinsic worth of the materials. *Id.* Whether a contract primarily concerns goods or services is generally a question of fact. *BMC Indust., Inc. v. Earth Indust., Inc.*, 160 F.3d 1322, 1331 (llth Cir. 1998). When there is no genuine issue of material fact, however, the court may determine the issue as a matter of law. *Id.*

In claiming that the contract is for the sale of services, RMS argues that its obligation under the contract was to provide a service to add value to the materials supplied by TBE. In making this argument, RMS principally relies on *Wells v. 10-X Mfg. Co.*, 609 F.2d 248 (6th Cir. 1979). *Wells* involved a contract to cut, make and finish hunting shirts. The Sixth Circuit held that the contract was for the rendition of services, relying on the fact that the contract language required 10-X to provide essentially the manpower and machine capabilities for the production of the hunting shirts and that the only material 10-X provided was the thread. *Wells*, 609 F.2d at 255.

The Court is mindful of the fact that a contract for specially manufactured goods is not necessarily a contract for the sale of goods. *Id.* at 254. In this case, however, RMS was to supply primer/paint/cleaning chemicals, consumables, and hydraulic fluid, which is more than essentially the manpower and machine capabilities that was required in *Wells*. RMS was to assemble and manufacture the AMTCs rather than simply add value to the raw materials.

The parties do not dispute that TBE supplied RMS with the specifications and most of the raw materials necessary to assemble and manufacture the ATMCs. Furthermore, RMS has come forward with affidavits supporting its claim that its duty under the contract was to provide services, that is, the necessary labor, processes and facilities to assemble the AMTCs with materials supplied by TBE. Hill Aff. ¶¶ 5-7; Heyman Aff. ¶¶ 5-7. However, in applying the factors to this case, the Court concludes that the contract primarily concerns the furnishing of goods. First, the contractual language provides a number of indicia that the contract is for the sale of goods. For example, the contract is titled "Purchase Order" and consistently refers to the parties as "buyer" and "seller." *See BMC Indus.*, 160 F.3d at 1331. In addition, the contract provides that title and risk of loss to goods shall pass to TBE upon receipt at TBE's designated destination, a provision consistent with § 7-2-401(1). And the fact that the AMTCs were movable at the time of identification to the contract for sale, as evidenced by the terms of the contract, further indicates that the contract was for the sale of goods pursuant to § 7-2-105(1). With respect to the second factor, RMS does not dispute that it is engaged in the business of manufacturing and selling AMTCs using its own materials, a fact that favors a finding that the contract is for the sale of goods. Finally, neither party addresses the intrinsic worth factor. Nonetheless, whereas no one factor is necessarily dispositive, the language of the contract and the nature of the business of RMS supports a finding that the contract is one for the sale of goods. Accordingly, the contract is governed by the UCC.

The Court must now determine whether the claims in Counts I and III are time-barred pursuant to the UCC statute of limitations. In exercising its diversity jurisdiction, the Court must apply the choice of law rules of Virginia, the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). "Virginia looks favorably upon choice of law clauses in a contract, giving them full effect except in unusual circumstances." *Hitachi Credit America Corp. v. Signet Bank*, 166 F.3d 614, 624 (4th Cir. 1994). Nonetheless, under Virginia choice of law rules, Virginia law governs procedure. *Jones v. R.S. Jones Assocs.*, 246 Va. 3, 5, 431 S.E.2d 33, 34 (1993). Generally, choice of law provisions in contracts are interpreted to apply only to substantive law as opposed to procedural law unless the provision expressly provides otherwise. *Des Brisay v. Goldfield Corp.*, 637 F.2d 680, 682 (9th Cir. 1981); *Fed. Deposit Ins. Corp. v. Peterson*, 770 F.2d 141, 142 (10th Cir. 1985). The UCC statute of limitations is a procedural law. *See Natale v. Upjohn Co.*, 236 F. Supp. 37, 41 (D.Del. 1964) (holding the four-year limitations period in the UCC imposes a procedural limitation and is not part of the substantive rights created by the statute), *aff'd*, 356 F.2d 590 (3rd Cir. 1966); *see also Des Brisay*, 637 F.2d at 682 (holding statutes of limitations are procedural law); *Commonwealth v. Owens-Corning Fiberglas Corp.*, 238 Va. 595, 598, 385 S.E.2d 865, 867 (1989). In this case, the contract's choice of law provision does, not expressly provide that Alabama procedural law, including its statute of limitations, applies. Thus, the Court finds that the choice of law provision governs only substantive law, and Virginia's UCC statute of limitations applies.

The Virginia version of the UCC provides that "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." Va. Code Ann. § 8.2-725(1). "A cause of action accrues when the breach occurs ...."§ 8.2-725(2). It is undisputed that TBE terminated the contract on February 29, 1996. RMS filed its complaint on February 28, 2001, five years after the claim accrued. Thus, the Court finds that the four-year statute of limitation bars the breach of contract claims alleged in Counts I and III. Accordingly, the Court GRANTS TBE's motion for summary judgment as to Counts I and III.

B. There is no genuine issue of fact as to when the claims in Counts II, IV and V accrued.

TBE moves for summary judgment on Counts II, TV and V on the grounds that the claims contained therein are time-barred under Virginia law. RMS argues that Alabama law controls pursuant to the contract's choice of law provision. As discussed *supra* Part III.A, statutes of limitations are procedural law, and the Court must apply Virginia procedural law to this case because the contract's choice of law provision applies only to substantive law.

Having determined that Virginia law will govern whether the claims in Counts II, IV and V are time-barred, the Court must next determine what particular statute of limitation applies to those claims. In Count II of its Complaint, RMS seeks recovery on the theory of quantum meruit, alleging that TBE impliedly promised to pay for the labor, equipment

and materials supplied by RMS in performing under the written contract. Compl. ¶¶ 34-35. This quantum meruit claim is based on a contract implied-in-law. *Po River & Sewer Co. v. Indian Acres Club of Thornburg, Inc.*, 255 Va. 108, 114, 495 S.E.2d 478, 482 (1998). Similarly, in Count IV, RMS alleges that TBE was unjustly enriched by its settlement with Lockheed Martin. Compl. ¶ 50. A claim of unjust enrichment is one in equity; thus RMS seeks recovery in Count IV pursuant to a contract implied-in-law as opposed to the written contract. *Belcher* v. *Kirkwood*, 238 Va. 430, 433, 383 S.E.2d 729, 731 (1989). In Count V, RMS seeks recovery under the theory of constructive trust, alleging that RMS is the true and equitable owner of TBE's settlement funds. Compl. ¶¶ 57-58. Like its unjust enrichment and quantum meruit claims, Count IV is based on an implied-in-law contract. *Tsui v. Sobral*, 39 Va. Cir. 486 (1996).

Section 8.01-246(4) of the Virginia Code provides that actions upon unwritten contracts, express or implied, must be brought within three years after the cause of action accrued. *See Harbour Gate Owners Ass'n Inc. v. Berg*, 232 Va. 98, 106, 348 S.E.2d 252, 257 (1986) (holding an implied-in-law contract is governed by § 8.01-246(4)). Thus, the claims asserted in Counts II, IV and V must have been brought within three years of their date of accrual.

There is no genuine issue as to when the claims asserted in Counts II, IV and V accrued. RMS does not dispute that TBE terminated the contract on February 29, 1996. Nor does RMS dispute that TBE entered into a settlement agreement with Lockheed Martin on

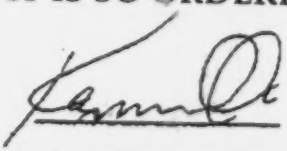
December 20, 1996. Accordingly, the Court finds that the claims asserted in Counts II, IV and V are time-barred pursuant to § 8.01-246(4), and **GRANTS** TBE's motion for summary judgment with respect to those claims.

IV. CONCLUSION

For the reasons stated above, the Court **GRANTS** TBE's Motion for Summary Judgment on all five Counts.

The Court **DIRECTS** the Clerk to send a copy of this Memorandum Opinion and Order to counsel for the parties.

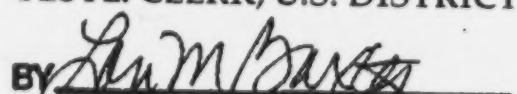
IT IS SO ORDERED.



UNITED STATES DISTRICT JUDGE

Norfolk, Virginia October 22, 2001

A TRUE COPY.
TESTE: CLERK, U.S. DISTRICT COURT

BY 

DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

RMS TECHNOLOGY, INC.,
Plaintiff,

v. **Civil Action No. 4:01cv22**

TDY INDUSTRIES, INC., t/a
TELEDYNE INDUSTRIES INCORPORATED
TELEDYNE TECHNOLOGIES INCORPORATED
TELEDYNE BROWN ENGINEERING, INC.,
Defendants.

[Entered: February 14, 2002]

ORDER

This matter comes before the Court on Plaintiffs (RMS Technology, Inc.) Motion for Reconsideration filed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. The Court has considered the memoranda of the parties and the matter is now ripe for decision. A hearing is not necessary as it will not aid the decisional process of the Court.

Courts recognize three grounds for amending an earlier judgement: (1) an intervening change in controlling law, (2) the emergence of evidence not previously available, and (3) the correction of a clear error of law or the prevention of manifest injustice. *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). Mere disagreement with a court's application of the law does not support a Rule 59(e) motion. *Id.* at 1082;

International Longshoremen's Assoc. v. Virginia Int'l Terminals, 932 F. Supp. 761, 762 (E.D. Va. 1996)." *International Longshoremen's Assoc.,* 932 F. Supp. at 762 (citing *Durkin v. Taylor,* 444 F. Supp. 879, 889 (E.D. Va. 1977)).

The Court finds that Plaintiff has none of the recognized grounds to reconsider its judgement. Plaintiff merely disagrees with the Court's ruling. Plaintiffs remedy is to appeal the Court's judgement.

Accordingly, the Motion to Reconsider is ***DENIED.*** The Clerk is ***DIRECTED*** to send a copy of this Order to counsel for the parties.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia February 14, 2002

A TRUE COPY.
TESTE: CLERK, U.S. DISTRICT COURT

BY _____
DEPUTY CLERK